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In the Supreme Court

of the

United States

OCTOBER TERM 1968

No. 525

MATSON NAVIGATION COMPANY,
Petitioner,

vs.

C. R. SMITH (SUCCESSOR), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY, and SAN DIEGO UNIFIED PORT DISTRICT,
Respondents.

Brief of Respondent States Steamship Company In Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

	Page
I. Opinions Below	1
II. Questions Presented	4
III. Statutes Involved	6
IV. Statement	6
V. Argument	17
A. The Limited Scope of Review	17
B. The Secretary's Order and Opinion Is Consistent With Section 805(a)	18
C. There Is No Conflict Between Decisions of the Court of Appeals	22
D. The Secretary's Decision Is Not Inconsistent with Other Agency Decisions	24
E. The Secretary's Determinations Are In Accordance With Law and Are Supported by the Record	27
VI. Conclusion	31
Appendices	

TABLE OF AUTHORITIES

Court Decisions	Page
Alaska S.S. Co. v. F.M.C. 344 F.2d 810 (9th Cir. 1965)	28
American Lines v. Louisville & N.R. Co. 20 L.Ed. 2d 1289 (1968)	28
American Trucking Ass'n, Inc. v. United States 344 U.S. 298 (1953)	18
Ark. Power & Light Co. v. F.P.C. 185 F.2d 751 (D.C.Cir. 1950)	28
Cardillo v. Liberty Metal Co. 330 U.S. 469 (1947)	18
Consolo v. F.M.C. 383 U.S. 607 (1966)	17
Gov't of Guam v. F.M.C. 329 F.2d 251 (D.C. Cir. 1964)	28
Illinois C.R. Co. v. N. & W.R. Co. 385 U.S. 57 (1966)	17
Minneapolis & St. Louis R. Co. v United States 361 U.S. 173 (1959)	17
Norfolk & W. Ry. v. United States 287 U.S. 134 (1932)	28
Northern Pacific Ry. Co. v. North Dakota 236 U.S. 585 (1915)	28
Pacific Far East Line, Inc. v. F.M.B. 275 F.2d 184 (D. C. Cir.) *cert. denied,* 363 U.S. 827 (1960)	23
Phelps-Dodge Corp. v. N.L.R.B. 313 U.S. 177 (1941)	18
Seatrain Lines v. Hodges 320 F.2d 737 (D.C. Cir. 1963)	22
S.E.C. v. Chenery Corp. 332 U.S. 194 (1947)	18
S.W. Elec. Power v. F.P.C. 304 F.2d 29 (5th Cir. 1962)	28
Udall v. Tallman 380 U.S. 1 (1965)	18
Unemployment Comm'n v. Aragon 329 U.S. 143 (1946)	18
United States v. Third Nat'l Bank 390 U.S. 171 (1968)	31

AGENCY DECISIONS

Page

American Export Lines, Inc.—Sec. 805(a) Application Docket S-134, 1 SRR 919 (1962) 25
American Export Lines, Inc.—Puerto Rico Service 1 MA 285, 3 SRR 898 (1964) 25
American Export Isbrandtsen Lines—Sec. 805(a) Application, 9 SRR 997 (1968) 26
American President Lines, Ltd.—Subsidy Route 17 4 FMB-MA 488 (1954) 24
American President Lines, Ltd.—Unsubsidized Operation Route 17, 3 FMB-MA 457 (1951) 24

Grace Line, Inc.—Application to Call at Puerto Rico 1 MA 284, 3 SRR 870 (1964) 25

Matson Navigation Co.—Hawaiian Rate Case 1 SRR 349 (1962).... 24
Matson Navigation Co.—Rate Structure 3 USMC 82 (1948)..... 24

Pacific Far East Line, Inc.—Sec. 805(a) Application 4 FMB 580 (1955) 26
Pacific Transport Lines, Inc.—Subsidy Route 29 4 FMB 7 (1952).... 7

States Marine Lines, Inc.—Sec. 805(a) Application 1 SRR 325 (1961) 25
States Steamship Co.—Hawaiian Outbound Calls, Docket S-128 1 SRR 599 (1961) 25

T. J. McCarthy S.S. Co.—Sec. 805(a) Application 5 FMB 666 (1959) 24

Waterman S.S. Corp.—Sec. 805(a) Application 6 FMB 115 (1960) 24

STATUTES AND MISCELLANEOUS — Pages

Administrative Procedure Act. Section II 5 U.S.C. §§ 702, 706..... 3

Congressional Record, Vol. 80, 74th Cong. 2d Sess. 10101 (1936) 21

Dept. of Commerce Order 117 (Revised), 27 Fed. Reg. 7687 (superseded by Dept. of Commerce Order 117-A, 31 Fed. Reg. 8087, 15331) 2

H.R. 8555, 74th Cong., 1st Sess. (1935) 20, 21

Merchant Marine Act, 1920, as amended, 46 U.S.C. §§ 861, et seq., Section 27, 46 U.S.C. § 883 15

Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101, et seq. (the Act) .....(cited throughout)

Section 101, 46 U.S.C. § 1101 6
Section 506, 46 U.S.C. § 1156 .....(cited throughout)
Section 511, 46 U.S.C. § 1161 ..... 8, 15
Section 605(a), 46 U.S.C. § 1175(a).....(cited throughout)
Section 805(a), 46 U.S.C. § 1223(a).....(cited throughout)

Senate Committee on Commerce, Hearings on S. 2582, 74th Cong., 1st Sess. (1935) 20

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Brief of Respondent States Steamship Company In Opposition to Petition for Writ of Certiorari

This respondent, States Steamship Company (States) does not dispute that this Court has jurisdiction and the petition is timely.

I.

OPINIONS BELOW

Matson Navigation Company's (Matson's) recitations in this regard do not clearly reflect the tortuous course of this proceeding as it has come before eight decision makers during the

seven and a half-year period since States' application was filed. There have been five agency decisions and three judicial decisions.[1] All of the decisions (except two superseded agency decisions) have supported States' application in full.

States filed its application with the agency on February 2, 1961 under Section 805(a) of the Merchant Marine Act, 1936, as amended (the Act) to increase its intermediate calls in domestic service between California and Hawaii from 13 to 26 per year in each direction (SA1).

The recommended decision of the Hearing Examiner of March 11, 1963, denied the application in general, but granted the service as between San Diego and Hawaii.

The decision of the Maritime Subsidy Board (Board) of November 27, 1963, granted States' application in full. The Board rejected the Hearing Examiner's recommendations and adopted his findings and conclusions only to the extent consistent with the Board's decision. The Board's decision appears in App. B, *infra*, pp. 41-66.

The matter was then reviewed by Secretary of Commerce Hodges pursuant to Department of Commerce Order 117 (Revised) 27 Fed. Reg. 7687. The Opinion and Order of Secretary of Commerce Hodges of April 23, 1964 in effect denied States'

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1. To maintain uniformity, record references in this brief will be designated in the same manner as selected by petitioner in its brief (p. 4, n. 1). The record references to the 8 decisions referred to follow in chronological order: (1) Recommended Decision of Hearing Examiner C. W. Robinson dated March 11, 1963 (SA64 2 Pike & Fischer Shipping Regulation Reports 535 [hereinafter cited as "SRR"]); (2) Final Opinion and Order of the Maritime Subsidy Board dated November 27, 1963 (SA80, 3SRR215); (3) Opinion and Order of Secretary of Commerce Hodges dated April 23, 1964 (SA94, 1 MA 37); (4) Order for Remand of U.S. District Court for the District of Columbia dated December 30, 1964 (SD9); (5) Recommended Decision of Review Examiner E. Robert Seaver dated March 1, 1965 (SD30, 5SRR799); (6) Opinion and Order of Secretary of Commerce Connor dated July 6, 1965 (SD69, 5SRR1111); (7) Memorandum Opinion and Order of U.S. District Judge Wollenberg dated August 10, 1966 (R 740-66a, 258 F.Supp. 144); and (8) the *per curiam* opinion of the court of appeals reported at 394 F.2d 514.

application, but granted States conditional permission to provide service from California to Hawaii.

States filed a complaint with the district court in the District of Columbia for judicial review of Secretary of Commerce Hodges' decision in accordance with Section 11 of the Administrative Procedure Act (5 U.S.C. §§ 702, 706). The first of the three judicial decisions in this case was the order of the district court remanding the case to the Secretary of Commerce (SD9).

For reasons set forth in his affidavit to the district court requesting remand (SD6), Secretary of Commerce Hodges upon remand, on January 4, 1965, set aside his decision, declared it void, and directed a further review by a Review Examiner under a special procedure (SD11). All parties concurred by stipulation.[2]

In response to the request of Secretary Hodges, E. Robert Seaver, Esq., a former General Counsel of the Federal Maritime Board, was selected by the Civil Service Commission and the Secretary appointed him Review Examiner (SD13). Among other instructions directed to the Review Examiner was one that the vacated decision of Secretary of Commerce Hodges "is not a precedent or authority in the further review of this case, and references in future argument, oral or written, to that decision are not to be permitted at any stage of this review" (SD14, p. 2.).

The Review Examiner issued his Recommended Decision on March 1, 1964. The Review Examiner concluded that permission is not required under Section 805(a), but that in the event permission is required, the application should be granted in full (App. A, *infra*, pp. 1-40).

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2. The Secretary requested the U.S. Civil Service Commission to select a "well qualified hearing examiner to assist the Secretary to review the decision of the Maritime Subsidy Board. . . ." It was pointed out "that it is important to select an examiner of very superior ability for this assignment" and it was emphasized that "a knowledge of the provisions of the Merchant Marine Act of 1936, as amended, relating to subsidies would be very helpful" (SD12).

Secretary of Commerce Connor (successor to Secretary Hodges) issued his opinion and order on July 6, 1965. This is the agency decision attacked by Matson. It granted States' application in full (Matson Brief, App. C., p. 28). Reconsideration was denied on August 23, 1965 (SD78). Thus, the agency itself has obliterated its two decisions which did not favor full grant of States' application. Four and a half years after filing its application States commenced its increased and extended Hawaii service so authorized.

The second judicial decision is that of the District Court for the Northern District of California following the decision of Secretary of Commerce Connor which affirmed the Secretary's decision granting States' application on Matson's complaint for judicial review (Matson Brief, App. B, p. 3). The third judicial decision was that of the court of appeals which affirmed the judgment of the district court. The court of appeals denied Matson's petition for rehearing (Matson Brief, App. A, p. 1).

Thus, the Secretarial review by and decision of Secretary of Commerce Connor, and judicial review by the courts below, have left undisturbed consistent findings and conclusions of the Board and the Review Examiner with which Secretary of Commerce Connor did not expressly disagree.

II.

QUESTIONS PRESENTED

Since the decisions of the courts below were rendered in an action for judicial review of the agency decision of Secretary Connor, it is appropriate to note the issues described by him for decision (Matson, App. B, p. 32): These issues are:

> a. Does section 805(a) of the Act require States to obtain written permission in order to engage, as proposed, in the domestic trade and, at the same time, receive operating-differential subsidy?

b. If the answer to the above issue is "yes," does Matson operate exclusively in the domestic service so as to be entitled to protection under 805(a) against the grant of an application that would result in unfair competition to such an operator?

c. If the answers to the above issues are "yes," would approval of States' application result in unfair competition to Matson, within the meaning of section 805(a)?

d. If the answer to the issue stated first above is "yes," would approval of States' application be prejudicial to the objects and policy of the Act within the meaning of section 805(a)?

The Secretary answered issue (a) "yes," States did need section 805(a) approval of its increased service (Matson, App. C, pp. 32-46). He answered issue (b) "yes," Matson was an exclusively domestic operator entitled to section 805(a) protection against unfair competition (Matson, App. C, pp. 46-51). Matson naturally accepts these decisions.[3]

Matson challenges the Secretary's answers to issues (c) and (d). The Secretary resolved both issues (c) and (d) against Matson. He found that granting States' application would not result in unfair competition to any exclusively domestic operator (Matson, App. C, pp. 52-68) and that grant of States' application would not result in prejudice to the objects and policy of the Act (Matson, App. C, pp. 68-83).

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3. Notwithstanding the rulings below, States has consistently argued and still contends that (a) Section 805(a) of the Act does not require States to obtain the written consent of the Secretary to operate in the domestic trades authorized by, and subject to the subsidy reduction and refund provided in Sections 506 and 605(a) of the Act; (b) or alternatively, that the subsidy proration provisions of those sections eliminated, as a matter of law, any claim of unfair competition, and (c) Matson, as the corporate parent of Oceanic Steamship Company, a subsidized operator and, by virtue of certain non-domestic operations, is not qualified for protection against unfair competition as a carrier "operating exclusively in coastwise or intercoastal service," within the meaning of Section 805(a). Such grounds would constitute additional reasons to sustain the decisions below.

Matson's questions for consideration appear at pp. 2-3. The principal challenge appears to be based on grounds that the findings of the Secretary are not supported by substantial evidence. A subsidiary ground is that the Secretary's decision is not consistent with law. The only question presented, however, is whether the courts below acted in accordance with the decisions of this Court by limiting the scope of their review of the Secretary's determinations to whether such determinations had a reasonable basis in law and were supported by substantial evidence.

In particular, the questions are:

1. Whether the Secretary's decision, including the "substantial competitive advantage" standard adopted by the Secretary and as approved by the courts below has a reasonable basis in law.

2. Whether the courts below erred in finding that the Secretary's decision is supported by substantial evidence.

III.

STATUTES INVOLVED

In addition to Section 805(a) of the Act, (49 Stat. 2012, as amended, 46 U.S.C. Sec. 1223 (a); Matson, App. D, p. 86); this case is directly concerned with Section 101 of the Act, (49 Stat. 1985, 4 U.S.C. Sec. 1101), Section 506 (49 Stat. 1999, as amended, 46 U.S.C. Sec. 1156), and Section 605(a) (49 Stat. 2003, as amended, 46 U.S.C. 1175). The texts of Sections 101, 506 and 605(a) are set forth at Appendix C, *infra*, pp. 67-68.

IV.

STATEMENT

Matson's "Statement" (pp. 3-12) cannot be left unchallenged. It asserts unwarranted conclusions instead of facts in many vital respects and fails to put its contentions in the proper perspective to permit the Court to appraise the same.

States, with its predecessors and affiliates, has owned and operated vessels in world-wide shipping operations, mostly trans-Pacific, for approximately 47 years (STr. 217-20, 279-80). Since 1957 and presently, its trans-Pacific services have been and are conducted under an Operating-Differential Subsidy (ODS) Agreement (SC9, 10) with the United States Government covering foreign commerce on Trade Route 29 (U.S. Pacific Coast/Far East) (SC107, p. 20).

In 1950, vessels of a predecessor company, Pacific Transport Lines (PTL) commenced making intermediate calls at Hawaii on trans-Pacific voyages between California and the Far East, discharging domestic cargo and loading foreign cargo, outbound, and reversing the process inbound to California. In 1952, anticipating award to it of an ODS contract, PTL applied under section 805(a) of the Act for permission to continue its Hawaii domestic service after the subsidy award. Such permission was granted[4] after the ODS contract was executed on December 31, 1952. The application and the permission involved 13 intermediate calls at Hawaii per year in each direction.[5]

The nature of States' service to Hawaii is of particular significance respecting the questions presented. Intermediate calls or stops are made at Hawaii by States' vessels on trans-Pacific voyages from California to the Far East and return. On such a round trans-Pacific voyage the vessel loads cargo at California ports for Hawaii and the Far East, usually at the same terminal and often simultaneously. The vessel then sails westbound from San Francisco carrying cargo destined for both Hawaii and the Far East in foreign trade. Only a minor deviation is involved for

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4. *Pacific Transport Lines, Inc.—Subsidy, Route 29*, 4 FMB 7 (1952).

5. When PTL was merged with States in 1957 such permission was transferred to States (STr. 223-24). Since that time all of States' services have been conducted under a single ODS agreement. Although vessels in States' services were permitted calls at Hawaii in States' ODS contract on all voyages, calls for domestic cargo purposes were required to accord with the Section 805(a) permission (SC9, pp. 6-8).

the Hawaii call in respect to the course it would otherwise maintain on trans-Pacific voyages. The domestic cargo is unloaded in Honolulu and in the space thus made free, available foreign cargo, destined for the Far East is loaded. The vessel then sails from Honolulu for the Far East. On the return leg of the round voyage, the vessel loads cargo in the Far East destined for both California and Hawaii and makes an intermediate call at Hawaii enroute to California. At Honolulu the vessel discharges the foreign cargo from the Far East and, in the space thus vacated, loads domestic cargo destined for California (SA64, p. 7; STr. 216, 242-44, 248-50, 450-53).

Thus these intermediate calls by States' vessels at Hawaii are dual-purpose and in each direction space is utilized twice. The cargo moving in either direction between California and Hawaii is in domestic commerce. But at the same time cargo in foreign commerce, moving between California and the Far East, is also aboard in this California-Hawaii segment. This is the "mixed" segment of the round voyage. The cargo moving in both directions between Hawaii and the Far East is also in foreign commerce.

Under the Act, provision is made to subsidize U.S.-flag liner operators engaged in the foreign commerce of the United States (46 USC Secs. 1151-1161, 1171-82). These subsidies are designed to eliminate the disadvantage to American operators vis-a-vis their low cost foreign competitors with respect to the cost of constructing vessels and in operating such vessels, especially with respect to crew wages.

As indicated, States is so subsidized and receives construction-differential subsidy (CDS) with respect to construction of new vessels and operating-differential subsidy (ODS) with respect to vessel operations in the foreign commerce of the United States.[6]

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6. More detailed explanation of the purpose and nature of ODS is contained in the Recommended Decision of the Review Examiner (App. A, pp. 10-11, *infra.*)

It is not the policy of the United States to subsidize operations in the domestic trades since foreign lines are not permitted to engage in such carriage. However, it is not the policy of the United States to foreclose U.S.-flag operators from engaging in domestic trades, even though they may be subsidized with respect to their services in foreign trades. In fact, the contrary is true. The Act (Sections 506 and 605(a)) prohibits payment of subsidy in respect of operations in the domestic trades generally but authorizes limited domestic operations in four specific cases, each of which applies to a voyage in mixed foreign and domestic trade. One of such specific exceptions, involved here, is a "voyage in foreign trade on which the vessel may stop at the State of Hawaii."

Sections 506 and 605(a) provide formulae for reducing and refunding subsidy when a subsidized carrier does engage in domestic trades in one of the four specific instances described above.[7]

The subsidy refund formulae are designed by Congress to eliminate the benefits of subsidy as far as domestic operations are concerned. These provisions of law, would, of course, be meaningless if it were not the policy of the United States to permit subsidized operators to engage in the four specific mixed foreign and domestic trades. In other words, Congress has anticipated the desirability of operators engaging in such mixed trades and has expressly imposed conditions which call for reduction and refund of subsidy to eliminate the advantage in domestic operations which would otherwise be present.

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7. Under Section 605(a) ODS may be paid for a voyage on one of the mixed foreign and domestic trades, but the subsidy payment is reduced by "an amount which bears the same ratio to the subsidy otherwise payable as such (domestic)" gross revenue bears to the gross revenue derived from the entire voyage."

To be eligible for ODS a vessel must be built in an American shipyard (46 U.S.C. Sec. 1171(a)). Under Section 506, pursuant to a statutory formula similar to that prescribed by Section 605(a), CDS, although paid directly to the American shipyard must be refunded to the Government by the shipowner if and when the vessel is operated in one of the authorized mixed foreign and domestic trades and gross revenue is derived therefrom."

In addition to the reduction of subsidy provided by Sections 605(a) and 506, Congress imposed an additional protection for exclusively domestic operators. Subsidized operators, before engaging in any domestic trade, directly or indirectly, must make appropriate application and receive written permission of the Maritime Subsidy Board. Section 805(a) provides that the Board shall not approve the application if it finds that doing so will either (1) result in unfair competition to any one operating exclusively in domestic service or (2) be prejudicial to the objects and policy of the Act.

In the decision under review the Secretary of Commerce considered whether grant of States' application would result in "unfair competition" to an exclusively domestic operator in the relevant trade.

The Secretary noted that none of the decisions which preceded his own had found that grant of States' application "would result in competing fraudulently, in a cutthroat manner, or in a way that is unfair according to applicable legal or ethical standards." He found no such common law varieties of unfair competition to exist in this case. Thus, specifically eliminated as grounds for denial of the application were such claims that States would engage in "cream-skimming," or that it would engage in cutthroat competition by rate cutting or by fixing rates below cost and by using profits of the subsidized operations to carry the loss or otherwise. (Matson, App. C, pp. 56-57, 73-74). The courts below agreed (Matson, App. B, pp. 23-24).

The Secretary concluded no unfair competition to Matson would result from grant of the application. The Secretary of Commerce considered whether States would have some residual subsidy benefit in respect to its proposed service. In defining unfair competition in this mixed voyage situation he adopted the standard of "substantial competitive advantage." This principle contemplates the agency will consider all the surrounding competitive circumstances pertinent to the impact of the proposed service upon oper-

ations of domestic operators. In other words, the Secretary contemplates that "substantial competitive advantage" is the equivalent of "unfair competition" (Matson, App. C, pp. 55-58). This standard was arrived at by the Secretary only after careful consideration of the unique situation presented in this case by the mixed foreign and domestic operations, the lack of any definition of "unfair competition" in the Act, but with due care paid to the purposes and objectives of the Act. The courts below agreed that this was an appropriate standard, the district court concluding:

> ". . . the standard of 'substantial competitive advantage' is the product of sound reason, administrative experience, appreciation of the complexities of the problem, and a thorough understanding of the statutory policies, which constitutes an allowable administrative policy judgment undisturbable on judicial review." (Matson, App. B, p. 18).

Under the "substantial competitive advantage" standard the Secretary considered the competitive setting—the relative competition which States would offer to Matson (Matson, App. C, pp. 58-59). The Secretary adopted findings showing Matson carries 98% of all Hawaii/Pacific Coast cargo and 95% of the liner cargo in the California/Hawaii trade and an even greater portion of all bulk cargo, concluding that Matson is, and has been for many years, by far the "predominant" carrier in the California/Hawaii trade (Matson, App. C, pp. 58-60). Matson's predominance in the trade was more accurately referred to by the Board as a "virtual monopoly" (App. B, Infra p. 63). After receiving the Secretary's findings in this connection and affirming the same as supported by substantial evidence, the district court also recognized Matson as a "near monopolist" and as having "a near monopolist's grip on the State of Hawaii" (Matson, App. B, pp. 19-21, 26).

The Secretary, following well-established precedent, refused to equate effective competition with unfair competition.

He found that the amount of domestic cargo that would be moved by States under its increased sailings would represent a

modest increase in effective competition by States but concluded that the small percentage of the cargo movement which States would carry would not constitute "substantial competition" (Matson App. C, p. 60). This was an additional factor considered in his finding that no unfair competition would result from grant of States' application. The courts below agreed this was a proper factor to be considered, noting that even if States proposed to carry substantial additional cargo, this would not be equivalent to a showing of substantial competitive advantage because of subsidy (Matson, App. B, pp. 20-21).

The Secretary gave full consideration to Matson's contentions that States' increased California/Hawaii service would be benefited to some extent by subsidy.

He first disposed of the major premise of Matson's opposition that States' competition would be intrinsically unfair in any case as its vessels probably would not be available for operation in any trade, foreign or domestic, were it not for the fact that its vessels are built and operated with subsidy assistance. He accepted the Board's findings that the subsidy reduction formulae abate subsidy advantage to "an important degree." The Secretary concluded the use of such vessels in mixed foreign and domestic trade as authorized by the Act, would not in and of itself make States chargeable with unfair competition (Matson, App. C, pp. 60-61).

The Secretary then considered the several tests advanced by Matson intended to demonstrate various advantages received by States from subsidy.

For example, Matson contended that under its calculations States is able to acquire new Mariners, which would be used partly in the domestic trade because of CDS, at substantially lesser cost than Matson. After adopting an equivalent basis for comparison and giving effect to the CDS refund formula, the Secretary found that the difference in cost was minimal (Matson, App. C, pp. 61-63). In connection with these findings the Secretary

also concluded after review of the legislative history of the Act that interest-free use of CDS was not intended by Congress to be an element of unfair competition (Matson, App. C, pp. 60-63). Also not considered to be an element of unfair competition was States' opportunity for tax deferment under the Act (Matson, App. C, pp. 63-64).

The Secretary then considered Matson's contentions that subsidy payments attributable to the domestic portions of its mixed foreign and domestic voyages during calls at Hawaii would exceed the subsidy reduction and refund as required by statutory formulae. The Secretary found Matson's claims of unremitted subsidy in this regard to be overstated. He recognized that the subsidy remaining after reduction and refund under the statutory formulae aided States in the carriage of *foreign* cargo during the California/Hawaii segment of the round voyage (Matson, App. C, pp. 64-65). Since States' vessels must traverse waters between California and the Far East, and on this segment the vessel is laden with both domestic and foreign cargo, it was both normal and necessary that under any attempted calculation some ODS should remain after the domestic trade reduction, to place States on a parity with its foreign-flag competitors.[8]

During the proceedings, Matson claimed that a vital question was whether States' proposed operations would be profitable. Early in the hearings States had shown that its proposed Hawaii service would be profitable. (STr. 6157). Since only a minor deviation is involved to add Hawaii as a port of call in the otherwise basic itinerary of its vessels, States evaluated the financial results of calling at this additional port by "incremental" accounting.

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8. States actually showed that the domestic trade reduction of ODS alone was excessive and that more subsidy was paid back than was attributable to the domestic portion under anyone's accounting theory (SA67, pp. 177-80). With dubious propriety Matson now claims (pp. 5-6) that States' subsidy support is $3,582,000 per year without explaining that this figure reflects both foreign and domestic operations and does not take into account subsidy reduction and refund under Sections 506 and 605(a).

States' projection demonstrated the increased profitability of both the foreign and domestic operations and the two combined, both before and after giving effect to subsidy refund to the Government of $1,179,976 (SC12, Item 10 (Rev.), p. 3). Neither the Secretary (Matson, App. C, p. 66), or the district court (Matson, App. B, pp. 21-23), or Matson (p. 14) dispute profitability on this basis.

Matson urged yet another accounting test designed to show subsidy benefits at the hearing. This test employed a full absorption basis of accounting. As contended by Matson, it purportedly showed that the domestic portion of States' mixed foreign and domestic sailings would be conducted at a loss. It was urged that this constituted the basis of an unfair advantage and should preclude granting of the application (Matson, App. C, pp. 65-67).

States disputed this conclusion as well as its factual basis. Both sides presented many demonstrations of the profitability of the unsegregated domestic operations of States' proposed mixed services using various, but accredited, accounting procedures. States' submissions included two analyses using a full absorption basis as well as the incremental approach (e.g., Matson, SC78-83; States, SC110, 112). The agency was therefore given a spread of assumed financial results based upon the various hypotheses employed by the accountants.

The Secretary gave full consideration to each approach, but accepted no single accounting approach as definitive (Matson, App. C, pp. 65-67). The decision of the district court, affirmed by the court of appeals, accepted the treatment given by the Secretary to this accounting issue and is predicated on the possibility that any one of the accounting presentations might prove to be correct (Matson, App. B, pp, 22-23). The Secretary agreed with the Board that the accounting controversy was not dispositive of the unfair competition issue (Matson, App. C, p. 67), a conclusion which the court below found to be "rational and supported by substantial evidence." (Matson, App. B, pp. 22-23).

The Secretary adopted the Board's conclusion that Sections 506 and 605 (a) "abate to an important degree" benefits derived from subsidy. Besides that he noted other equalizing forces that would prevent States from having an unfair advantage in this regard identifying the statutory and contractual restrictions upon subsidized operators and government aid to domestic operators (Matson, App. C, p. 67).[9]

In considering the impact of the grant of the application on Matson's cargo carryings, the Secretary refused to equate the modest increase in effective competition proposed by States with "unfair competition" in the light of projected growth in the trade and Matson's predominance in the trade as compared with States. (Matson, App. C, pp. 67-68).

The Secretary then turned to the question of whether granting States' application would result in "prejudice to the objects and policy of the Act" (Matson, App. C, pp. 68-83). After reciting the statutory objects and policy he noted "the concern here is whether the grant of States' application would be prejudicial to the development and maintenance of an adequate and well-balanced merchant marine, or prejudicial to the provision of ocean transportation services needed by the shippers and the geographic areas involved" (Matson, App. C, pp. 69-70).

The Secretary found that the California-Hawaii trade will grow enough to accommodate both Matson as the predominant carrier and States as a supplemental carrier. He rejected Matson's claims that States' additional service would cause either an increase in rates or curtailment of service by Matson. He emphasized his rejection of the contention that States would confine itself to "cream

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9. Matson is protected by the cabotage laws which insulate it and other American-flag operators from foreign competition (46 U.S.C. Sec. 883), and Matson has been aided by the so-called Section 511 funds (46 U.S.C. Sec. 1161) in the disposition and acquisition of its vessels, and the tax advantages accruing therefrom (SC87, note; STr. pp. 5500-01, 5505-10).

skimming" operations or rate cutting.[10] The Secretary concluded that in the light of these factors and Matson's pre-eminent position in the trade and shipper connections, that there would not be any "significant detrimental impact" on Matson (Matson, App. C, pp. 70-75, 77-78).

The Secretary saw considerable benefits to the objects and policies of the Act as the result of States' increased Hawaii calls. Matson operates a service very close to capacity and there was need for States' service to relieve inadequacy in Matson's "tight" service which appeared from time to time (Matson, App. C, pp. 73, 75-78). It would provide badly needed service between San Diego and Hawaii which Matson did not provide (Matson, App. C, p. 78). The courts below found a "definite need" exists for better service in the California to Hawaii trade (Matson, App. B, p. 25, n. 22). The Secretary also found that benefits to the foreign commerce would accrue from grant of the application (Matson, App. C, pp. 79-81). The courts below upheld "without hesitation" the Secretary's findings under Section 805(a) that granting of the application would not do prejudice to the objects and policy of the Act (Matson, App. B, p. 24).

As it has done here Matson attempted to convert its "benefits from subsidy argument" into a claim of unfair competition and prejudice to the objects and policy of the Act, on grounds that there is, prospectively, a "diversion" of subsidy in violation of the second paragraph of Section 805(a). The Secretary considered and rejected this claim (Matson, App. C, pp. 81-82). The courts below found the Secretary's disposition of this claim entirely consistent with the intent of Section 805(a) noting that it was designed to prevent deliberate shuffling of funds from subsidized operations, a circumstance not presented by "the unique mixed

10. The district court said: "He (the Secretary) had good reason and ample testimony to believe that States would continue to adhere to the dominant carrier principle of following Matson's rates (Matson, App. B, p. 23).

service situation specifically provided for in the Act by Sections 506 and 605(a)" (Matson, App. B, p. 17).

The Secretary, mindful of the purpose of the Act to accord substantial protection to exclusively domestic operators, provided for review of the competitive situation at the end of a reasonable period in the light of actual experience (Matson, App. C, pp. 68, 83-85).

V.

ARGUMENT

A. The Limited Scope of Review

The decision of this Court in *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) emphasized that the courts of appeal, when reviewing agency actions, are bound by the substantial evidence rule. This Court noted that whether the court of appeals would have reached the same result as the agency is immaterial when the agency's action has a reasonable basis in law and is supported by the whole record. Thus, the "deference" accorded the agency's decision by the court of appeals on judicial review is required by *Consolo*.[11]

The decisions of the courts below that the determinations of the Secretary have a reasonable basis in law and are supported by substantial evidence dispose of all issues raised anew by Matson's petition. A substantial question for review is not presented to this Court when, as in this instance, petitioner merely seeks review of disputed evidence and specific facts all of which have been resolved during the lengthy course of the several agency procedings and by the courts below, contrary to petitioner's views.

In an effort to fashion a question of law to support its petition, Matson argues that the Secretary was required by law to give exclusive consideration to its accounting version of the profitability of States' Hawaii service, and that he and the courts below erred in not remanding the Secretary's decision for this and related

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11. A principle followed also in *Illinois C. R. Co. v. Norfolk and Western R. Co.*, 385 U.S. 57, 69 (1966); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 189 (1959).

reasons. A finding which the Secretary did not make, that States would receive subsidy support for its Hawaii service becomes the fictional predicate for much of Matson's claim that the Secretary's decision is not in accordance with law. Essentially, Matson's argument on the law is to the effect that the Secretary applied the wrong standard.

As the district court observed, a reviewing court must guard against the danger of "sliding unconciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). All that is needed to support the Secretary's interpretation of the Act is that it has warrant in the record and a reasonable basis in law. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-54 (1946).

The courts below gave extensive, meticulous consideration to their responsibilities on review, the district court giving particular attention to the standard adopted by the Secretary (Matson, App. B, pp. 8-18). The courts below unequivocally endorsed the Secretary's decision as supported by substantial evidence, within authorized agency discretion and in accordance with law. This was no grudging affirmance. Indeed, the district court praised the Secretary's opinion "for its clarity, documentation and thoroughness" (Matson, App. B, p. 27 n. 23). Therefore, Matson must sustain the heavy burden of attacking not only the Secretary's order but also judicial affirmance thereof.[12]

B. The Secretary's Order and Opinion Is Consistent with Section 805(a)

Matson reargues its version of the legislative history of Section 805(a) which it presented before the agency and the courts below. By a highly selective interpretation Matson asserts Section 805(a) was intended to provide absolute protection and promotion of

12. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 207 (1947); *American Trucking Ass'n, Inc. v. United States*, 334 U.S. 298, 314 (1953); *Cardillo v. Liberty Metal Co.*, 330 U.S. 469, 477-479 (1947).

exclusively domestic operators with the startling conclusion that a subsidized operator "had no place in" the domestic service as against unsubsidized American flag operations (pp. 16-17).

Section 101 of the Act declares it to be the policy of the United States to foster and encourage a Merchant Marine sufficient to carry its domestic waterborne commerce and a substantial portion of United States foreign commerce. The Secretary and the district court rejected Matson's claim that the subsidized operator had no place in domestic commerce. The court pointed out that "nowhere in Section 101 of the Act is there any suggestion of a policy against American-flag vessels promoting both the foreign and domestic commerce of the United States on the same voyage." He added that in fact Congress expressly showed its awareness of these objectives obtained through mixed foreign and domestic voyages provided the operators complied with the subsidy reduction and refund formulae (Matson, App. B, pp. 10, 14-15).

Many of Matson's omissions and distortions in its previous presentation of legislative history were corrected by the district court. The district court, for example, noted that the abuses of mail subsidy which Congress sought to preclude under the new subsidy system provided by the Act were most common in two types of operations, neither of which related to intermediate calls at Hawaii by vessels on trans-Pacific voyages in the foreign trade (Matson, App. B, pp. 12-13),[13] although Matson in its brief, suggests to the contrary.

The district court also recognized that the promotion of both foreign and domestic commerce of the United States was intended by Congress to be accomplished as an object of the Act by subsi-

13. e.g., the piping off of subsidy funds by a subsidized contractor to separate affiliated corporations engaged in domestic trade or the receipt of subsidy funds by almost exclusively domestic operators because they happened to touch at a foreign port incident to their domestic service (Matson, App. B, pp. 12-13).

dized vessels on the same voyage in the four mixed foreign and domestic trades specified in sections 506 and 605(a) even though competition with exclusively domestic operators might result (Matson, App. B, pp. 10, 14-16). Matson would have this court mistakenly believe that Congress authorized such mixed foreign and domestic trading by subsidized vessels only where "there were no exclusively domestic services" (p. 20).

Congress contemplated that it would be in the public interest for subsidized carriers to provide mixed service in those trades in some cases, an intention recognized by the Secretary (Matson, App. C, p. 83). The court agreed and stated that it was even foreseen at the Congressional hearings that proration might not always remove all benefits of subsidy to an operator of a mixed foreign and domestic service in competition with an unsubsidized operator in the domestic trade (Matson, App. B, pp. 14-15, and fn. 12). Section 805(a) adds the further requirement that such calls may not result in unfair competition to exclusively domestic operators. Thus, the district court stated the exclusive domestic operator is given "double protection" from the subsidized operator (Matson, App. B, p. 10).

Matson has argued from the language of an amendment to S. 2582 introduced prior to enactment of the 1936 Act that is said to have "provided an absolute prohibition against domestic operations by subsidized operators" (p. 18). Matson's version of the legislative history fails to disclose that at the time the amendment was proposed, S. 2582, then before the Senate, authorized subsidized vessels to engage in specific mixed foreign and domestic trades and required reduction and refund of subsidy. These sections were not affected by the proposed amendment: (Sections 504 and 507(d) of S. 2582 found in Senate Committee on Commerce, Hearings on S. 2582, 74th Cong. 1st Sess. pp. 6-9, 158-59, 188-89 (1935), described by the Review Examiner) (App.

A, pp. 18-20, *infra*).[14] Moreover, as the district court noted, neither this amendment nor the companion amendment proposed in the House were retained in H.R. 8555 which became law (Matson, App. B, pp. 15-16, n. 13). On June 19, 1936, the very day a compromise bill, which included authorization for mixed foreign and domestic voyages subject to subsidy proration provisions, as well as the present version of Section 805(a), was finally passed by the Senate, the proponent of the amendment expressed his satisfaction with the bill (80 Cong. Rec., 74th Cong. 2nd Sess. p. 10101 (1936).

The "anti-diversion" paragraph of Section 805(a) does not, as Matson argues (p. 20), prescribe any additional barrier to the grant of States' application. Matson forgets that Congress authorized mixed foreign and domestic voyages with an intermediate Hawaii call, conditioned upon subsidy reduction and refund. Subsidy proration is imposed for the very purpose of extracting subsidy support for domestic operations. Even so, the district court noted, there remains the possibility of some residual subsidy benefit without purposeful diversion, a matter which the Secretary quite properly regarded as a potential "unfair competition" claim (Matson, App. B, pp. 16-17). The second paragraph of Section 805(a) is concerned, not with residual subsidy benefit which may remain after proration, but with the deliberate "shuffling" of funds from subsidized to unsubsidized domestic operations, as the district court observed. Indeed, the legislative history indicates that Congress was primarily concerned with the deliberate and devious misdirection of mail subsidy to what were separate domestic operations. It is this purposeful shuffling of funds which is subject to the criminal penalties of Section 805(a). No claim has been made in this case that such has or is likely to occur.

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14. The prohibitory language of the amendment dealt with the domestic intercoastal or coastwise service "whereas at this time Section 1010 of S.2582 included in the definition of "foreign trade," calls at a "territory or possession" (e.g. Hawaii), if such calls were made as an "intermediate stop on what would otherwise be a voyage in foreign trade" (Ibid., p. 17).

In sum, the objective of Matson's misconceived legislative history is to resuscitate the judicially discarded notion that subsidized operators are prohibited from competing in the domestic trades on the basis that domestic operators are "fundamentally entitled" to carry all the cargo in the domestic trades they are able to carry.

C. There Is No Conflict Between Decisions of the Court of Appeals

Matson's first ground for the grant of certiorari is a supposed conflict between the decision of the court of appeals below and two other courts of appeal cases dealing with Section 805(a) (p. 13). Both cases mention the "anti-diversion" language of Section 805(a) but not in the context of mixed foreign and domestic operations authorized under Section 506 and 605(a) and as to which subsidy is prorated. They are not in conflict with the decision below.

The first such case, *Seatrain Lines v. Hodges,* 320 F.2d 737, 740 (D.C. Cir. 1963), deals with issues and facts wholly unrelated to this case. There, Waterman Steamship Corporation had received, after hearings, written permission under Section 805(a) to continue its affiliations with two subsidiaries engaged in the domestic trade. Some time later, Waterman proposed a corporate reorganization directed at divorcing or removing the affiliation between it and its domestic subsidiaries. The Maritime Subsidy Board determined administratively the reorganization would accomplish Waterman's disaffiliation, so far as Section 805(a) was concerned. This decision was upheld by the Secretary of Commerce.

Seatrain challenged this administrative determination, the only issue before the court being whether 805(a) requires hearings when the Board passes upon the question of affiliation (320 F.2d at 740). The court ruled that Seatrain was not entitled to a hearing on this issue since the Board's action was in the nature of an "advisory opinion" only. The court of appeals noted that:

"If the subsidized carrier had incorrectly appraised the legal character of its affiliation and if any assets used in foreign operations are diverted into domestic operation, the carrier is subject to prosecution" (320 F.2d at 741).

This decision offers no support whatever for the proposition the agency must make a finding respecting the likelihood of commission of a criminal act as a third pre-condition to the grant of permission under Section 805(a).

A similar reference to the concluding paragraph of Section 805(a) is also made, citing *Pacific Far East Line, Inc. v. F.M.B.*, 275 F.2d 184, 186 (D.C. Cir. 1960) *cert. denied*, 363 U.S. 827. There the court adopted the position that competition is not "unfair" when it does not involve diversion of money to a separate domestic service from subsidized foreign operations to the disadvantage of an unsubsidized operator. The Secretary quite consciously utilized a consistent standard in the present case in adopting the substantial competitive advantage test. He applied this standard with the approval of the courts below to the mixed foreign and domestic service, with its attendant subsidy proration, extracting subsidy attributable to domestic operations (Matson, App. C, pp. 57-58; App. B, p. 17).

Noting, presumably, that the court of appeals in the *PFEL* case indicated that it might be deemed unfair to engage in "cut-throat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying substandard wages, or by using substandard wages, or otherwise" (184 F.2d at 186), Matson endeavored throughout this proceeding to paint an image of States engaging in cut-throat competition and relying on subsidy to support such practices. Matson was unable to prove this charge to the satisfaction of any of the eight decision makers hearing this case (Matson, App. C, pp. 56-57).

The courts below found good reason and ample testimony to support this conclusion (Matson, App. B, p. 23). The testimony showed and the Hearing Examiner, the Board and the Review

Examiner found that States' intended to follow Matson's rates, which can hardly constitute cutthroat competition (SA64, pp. 9, 23; Matson, App. C, pp. 56-57, 73-74; App. A, *infra*, p. 34) States has consistently followed Matson's rates and intends to continue to do so.[15]

D. The Secretary's Decision Is Not Inconsistent with Other Agency Decisions.

Matson cites nine agency decisions as purported examples of a long line of decisions standing for the proposition that Section 805(a) meticulously protects the domestic operator against "subsidized competition" by holding the same to be *prima facie* unfair competition and prejudicial to the objects and policy of the Act (pp. 21-23). But Matson fails to inform the court (1) that at the time most of those decisions were rendered (most involving unsubsidized vessels) the agency was following the principle, subsequently discarded in *PFEL*, that domestic operators were "fundamentally entitled" to all available cargo in the domestic trade, and (2) that such doctrine has been completely repudiated and abandoned.[16]

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15. Matson was unable to show that States' rate level was lower than Matson at any time except during a hiatus during which Matson's successive rate increases were being vigorously contested by the State of Hawaii and others before the Federal Maritime Commission (Tr. 312-19). In 1959, August, 1961, and in the Fall of 1961, Matson raised its rates by 12½%, 10% and 9.8%, respectively. After an adverse ruling by the Examiner of the Federal Maritime Commission in *Matson Navigation Co. —Hawaiian Rate Case*, 1 SRR 349 (1962) Matson rolled back its rates to the level obtaining in August, 1961. States, before and since has continued to follow the rates charged by Matson in consequence of the dominant carrier principle of rate-making recognized by the Federal Maritime Commission. *Matson Navigation Company—Rate Structure*, 3 USMC 82, 83 (1948), and *Hawaiian Rate Case, supra*. at 355.

16. *American President Lines—Unsubsidized Operation Route 17*, 3 FMB-MA 457, 470 (1951); *American President Lines, Ltd., Section 805(a) Application*, 4 FMB-MA 436, 440 (1954); *American President Lines, Ltd.—Subsidy Route 17*, 4 FMB-MA 488, 504 (1954); *T. J. McCarthy Steamship Co.—Sec. 805(a) Application*, 5 FMB 666 (1959); *Waterman S.S. Corp.—Sec. 805(a) Application*, 6 FMB 115 (1960), and *Pacific Far East Line, Inc.—Sec. 805(a) Applications*, 4 FMB 580 (1955).

The court of appeals in the *PFEL* case condemned the fundamental entitlement doctrine, holding:

> "However adequate Matson's service may be, and in whatever sense Matson may need to retain its monopoly of the California-Hawaii trade, we cannot accept the Board's view that Matson is 'fundamentally entitled' to retain this monopoly against a competitor that is subsidized as Matson itself is, through its subsidiary Oceanic—in a different trade." (275 F.2d at 186).

The Board and its predecessors subsequently made clear that such doctrine of fundamental entitlement would no longer be followed.[17] This was emphatically reaffirmed by the Board in the present case (App. B, *infra*, pp. 14, 19-20) and by the Secretary (Matson, App. C, pp. 55-56). The district court below agreed (Matson, App. B., p. 16).

Matson also relies on Secretary of Commerce Hodges' decisions in *American Export Lines, Inc., Puerto Rico Service*, 1 MA 285 (1964) and *Grace Line, Inc., Application to Call at Puerto Rico*, 1 MA 284 (1964). Both cases depend entirely on Secretary Hodges' voided opinion in this case (SD11, SD 14, p. 2). They obviously can not have any authority here.[18]

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17. *States Marine Lines, Inc.—Sec. 805(a), Application Docket S-57* (Sub No. 5, 7 FMB 378, 1 SRR 325 (1961); *American Export Lines, Inc., Application Docket S-134*, 1 SRR 919 (1962); *States Steamship Company—Hawaiian Outbound Calls, Docket S-128*, 1 SRR 599 (1961).

18. As explained earlier, Secretary Hodges vacated and set aside his opinion in the *States* case and established special procedures by which the *States* case could be reviewed again. The Review Examiner was instructed that it was "not a precedent or authority for the further review of this case and references in future argument, oral or written, to that decision as precedent or authority are not to be permitted at any stage of this review" (S.D. 14, p. 2). The *Grace Line* case was issued the same day and appended to Secretary Hodges vacated opinion in the *States* case. The *American Export* decision followed one week later. The entire legal basis for his opinions in the *Grace Line* and *American Export* cases was predicated upon his 10 page opinion in the *States* case which was vacated on January 4, 1965. Thus, Matson's reliance upon Secretary Hodges' vacated opinion in the *States* case (p. 11) or the collapsed status of the *Grace Line* and *American Export* cases (p. 21) is misplaced.

Matson claims *Pacific Far East Line, Inc.—Section 805(a) Applications,* 4 FMB 580 (1955), as inconsistent with this decision. In that case an application for a subsidized operator to act as agent for an affiliated coastwide operator was denied as being contrary to the objects and policy of the Act, principally on grounds of the subsequently discarded "fundamental entitlement" theory. The agency was unable to consider a claim that performance by PFEL of its services would give its domestic affiliate a financial advantage because the applicant had failed to furnish competent evidence in this regard (p. 591). By contrast, extensive financial evidence was received and considered in the present case to determine the unfair competition and objects and policy of the Act issues.

Matson's claims (pp. 29-31) of subsequent chaotic administration of Section 805(a), following the court of appeals decision in *PFEL,* are without merit. Matson cites the *American Export Lines* and *Grace Line* cases which, as shown, were based on the voided authority of Secretary of Commerce Hodges' opinion and order. The Board's decision in *American Export Isbrandtsen Lines, Inc.—Section 805(a) Application,* 9 SRR 997 (1968) is not inconsistent with the Secretary's decision here under review. The Board was there dealing with a new situation where, by virtue of the Board-approved terms of a corporate reorganization, the operations of an affiliate engaged in domestic service were financially insulated from subsidized foreign operations. The Board carefully distinguished prior cases involving use by ODS contractors of subsidized or unsubsidized vessels in either the mixed foreign and domestic or with vessels of affiliated companies in the domestic trades and the possible impact of subsidy thereon without the insulation present in that case (9 SRR at 1003). The Board, too, consistent with the *PFEL* case, once again rejected the doctrine of "fundamental entitlement" in considering whether prejudice to the objects and policies of the Act would occur. (9 SRR 1004).

The fears which Matson expresses based upon the record in an unresolved case pending before the Board, (p. 30) concerning new competition in the California/Hawaii trade, must be measured against the fact that for many years Matson has retained its monopoly against other carriers which have unsuccessfully attempted to enter this trade (Matson, App. C, p. 59). Surely, our fiftieth State is entitled to competitive service, particularly when existing service has been shown to be insufficient for shipper needs. As the courts below observed, unsubsidized carriers have little occasion from this case to fear any sudden intrusion into their trade by subsidized operators (Matson, App. B, p. 27).

E. The Secretary's Determinations Are in Accordance with Law and Are Supported by the Record

As we have seen, Matson resorted to raising every possible detrimental effect which might follow grant of the additional 13 calls (Matson, App. B, p. 25). Included in these efforts were a variety of accounting presentations designed to show benefits from subsidy.

Matson selects one of the accounting presentations for consideration here. It asserts that Section 805(a) requires the profitability of the domestic operation be determined in a mixed voyage situation to gauge the dimension of subsidy support adding that this requires the test of full absorption accounting (p. 27).

The Secretary had before him a spread of possible financial results of States' domestic Hawaii operation, utilizing both incremental and full absorption accounting submitted by both parties, based upon (the district court found) "modern accounting practice" (Matson, App. B, p. 22). All were considered by the Secretary but he concluded that no single approach was definitive after explaining the various cost allocations considered (Matson, App. C, pp. 66-67). The Secretary made it clear that any finding of unprofitability on Matson's theories is not "automatically

dispositive of the case" (Matson, App. C, p. 67). The Board had emphasized that this is only one factor to be weighed and is not controlling as a matter of law. "There is no law, of which we are aware," said the Board, "requiring that proposed service shall be approved only if it satisfies a full cost absorption theory" (App. B, *infra*, p. 55, n. 6).

Thus, full absorption accounting was specifically rejected by the Board and the Secretary as the exclusive test required by law to determine whether States' proposed service would result in unfair competition or prejudice to the objects and policy of the Act. Matson has cited no authority to the contrary.[19]

The refusal of the Secretary or the courts below to convert hypothetical projections into a specific finding is the gravamen of Matson's petition here. The decisions of the courts below are based on the possibility that any one of the accounting presentations could prove to be an accurate portrayal of profitability (Matson, App. B, pp. 22-23). The Secretary found that

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19. Matson has not substantiated its flat assertion (p. 28) that Section 805(a) "circumscribes" the agency in this regard. The rate-making cases Matson cites do not support a conclusion that its full cost absorption accounting approach is an exclusive test even in rate-making cases. In *American Lines v. Louisville & N.R. Co.*, 201 L.Ed. 2d 1289 (1968), this Court recognized that Section 15(a)(3) of the Interstate Commerce Act did not constitute a categorical command to use any particular accounting approach. The court made it clear that the regulatory agency has discretion to determine the appropriate approach to accounting problems, noting the courts are not particularly suited to pass on the merits of accounting arguments. 20 L.Ed. 2d 1301, n. 16. See, *Norfolk & W. Ry v. U.S.*, 287 U.S. 134 (277) (1932); *S.W. Elec. Power v. F.P.C.*, 304 F.2d 29, 42 (5th Cir. 1962); *Ark. Power & Light Co. v. F.P.C.*, 185 F.2d 751, 753 (D.C. Cir. 1950). Other cases Matson cites (pp. 25-26 in rate-making proceedings have only academic interest. *Northern Pacific Ry. Co. v. North Dakota*, 236 U.S. 585, is a rate-making case invoking the Fifth Amendment, holding that the public interest was no ground for forcing a common carrier to charge a rate which did not compensate a carrier beyond the additional costs incurred in transporting an additional commodity. *Government of Guam v. Federal Maritime Comm.*, 329 F.2d 251 (D.C. Cir. 1964) and *Alaska Steamship Co. v. F.M.C.*, 344 F.2d 810 (9th Cir. 1965) did no more than approve a proration of overhead expenses on the basis of voyage expenses without discussing full absorption techniques.

nowhere within the range of the maximum profitability and maximum loss reflected in the several accounting projections of States' proposed domestic service would there be either unfair competition or prejudice to the objects and policy of the Act, conclusions with which the courts below agreed. The short answer to Matson's contention is that the Board, Secretary and the courts made it perfectly clear that the result would have been the same, even had it been found that Matson's most enthusiastic "loss" projection had been the only correct one.

There is another answer to this contention. Matson claims (Matson Br., p. 14) unfair competition and "acts" prejudicial to the objects and policy of the Act irrespective of whether States' domestic Hawaii operations would be profitable or not. For in the Matson lexicon, the "benefits derived by States from subsidy"—(e. g., vessels constructed with the aid of CDS with attendant statutory interest and tax treatment and operated with the aid of ODS) would render States' application unapprovable under any accounting theory under its reincarnation of the discredited "fundamental entitlement" principle. In other words, under Matson's argument, States' application should be denied whether States' proposed operation would enjoy a profit or suffer a loss.

The confusion between some residual benefit from subsidy and shuffling of funds lies at the foundation of Matson's claim of a prospective diversion in violation of the second paragraph of Section 805(a). Congress has authorized subsidized vessels to participate in selected domestic trades under Sections 506 and 605(a) but required a refund and reduction of subsidy under its own formulae for the purpose of extracting subsidy benefits during such domestic trade participation. The subsidy that remains supports the foreign, not the domestic trade. It is not realistic to contemplate that Congress intended, even assuming some residual subsidy benefits remain after proration, that exclusively domestic operators are not to be exposed to fair competition by this authorized limited participation in domestic commerce.

The "substantial competitive advantage" standard is a rational test adopted by the Secretary to determine whether, for any reason, States would pose unfair competition to Matson. As the Secretary and courts below demonstrated, Congress prescribed no specifics for determining these issues (other than the provisions of 506 and 605(a) in the case of the authorized mixed foreign and domestic voyages).[20]

Moreover, the Secretary's standard also accords with that prescribed by the *PFEL* case:

> "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California/Hawaii trade because it has a subsidy in the Far East trade." (275 F.2d at 186).

Using this as a guideline, the Secretary therefore quite properly measured the potential effects some residual benefits from subsidy States might have which would afford competitive advantage over Matson. It is immaterial whether States' contemplated operations would result in profit or loss unless in either case it would result in substantial competitive advantage. For example, if States had, with the aid of subsidy, proposed to engage in cutthroat rate-cutting practices intended to drive out exclusively domestic operators, an entirely different picture would be presented here. So also, if States should use its subsidized status to achieve a stranglehold over commercial shippers in the trade, or to create or perpetuate a monopoly displacing domestic operators in the trade. These are the indicia of "substantial competitive advantage." Even if States' competition were to be substantial, it would not be equivalent to unfair competition (Matson, App. B, p. 23).

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20. Of course the Secretary did give effect to these standards by finding the provisions of 506 and 605(a) "abate to an important degree" any benefit from subsidy (Matson, App. C., p. 67) and show Congress "contemplated it would be in the public interest for subsidized carriers to provide services in these trades in some cases" (Matson, App. C., p. 83).

Matson characterizes the Secretary's decision a "balancing exercise" evoking the false image of precisely weighted elements placed in a carefully calibrated scale. Even if this over-simplified interpretation is true, the Secretary carefully considered each element in respect to unfair competition, in the form of substantial competitive advantage, and under the objects and policy of the Act. Reliance by Matson on *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968) is futile, for unlike that case, we do not have issues which are primarily legal but issues which are unquestionably for administrative determination and a decision which has a rational basis in law and findings amply supported by substantial evidence.

VI.

CONCLUSION

The proposed increase in States' domestic operations on its mixed foreign and domestic voyages is in the trades and in the manner expressly provided for by law. In order to avoid subsidization of domestic operations by operators who receive subsidy in their foreign operations, Congress prescribed explicit formulae to reduce and refund subsidy to prevent subsidy advantage in the domestic trade. Fearing shuffling of subsidy funds to domestic operations, Congress made such acts a crime. Even if these safeguards were not sufficient the agency under Section 805(a) will not grant permission to subsidized operators to enter the domestic trades if it finds unfair competition will result. As a final safeguard, permission will be refused if such operations will be contrary to the underlying objects and policy governing our merchant marine.

States has met and will continue to meet each of the foregoing requirements. States has met and surmounted each of the tests imposed by Sections 805(a), 506 and 605(a). With respect to unfair competition, the Secretary has refused to exhume the dis-

credited principle that exclusively domestic operators are "fundamentally entitled" to the domestic trade, and has substituted the principle of "substantial competitive advantage."

The Secretary has carefully considered all elements relevant to competition and has found that but a modest impact will be made upon Matson's monopoly by permitting States to participate in that trade; that States by virtue of its subsidized status, or otherwise, will not enjoy any unfair competitive advantage, nor will it compete by cream-skimming, cutthroat competition, rate-cutting, or in any other unfair manner.

In the area of the accounting issues all estimates and projections were carefully considered, including those which Matson urges. Nowhere within the range of accounting estimates did the Secretary find unfair competition would be created, or that the objects and policy of the Act would be prejudiced. The Secretary has found that not only would there be no prejudice to the objects and policy of the Act, but the same will be enhanced by grant of the application.

Every finding is supported by substantial evidence and by standards which are reasonable.

Matson's petition should be denied.

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